Supreme Court, U.S.
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No. 10

IN THE

Supreme Court of the United States

MARK W. JENNEY

Petitioner

v.

CITY OF BARBERTON

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment extends to all criminal defendants, even those charged with a minor misdemeanor traffic offense?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mark Jenney respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio in this case.

OPINIONS BELOW

The decision of the Supreme Court of Ohio sought to be reviewed, Appendix ("App.") 1a-14a is reported at *Barberton v. Jenney*, 126 Ohio St.3d 5 (Ohio 2010). The opinion of the Ohio Ninth District Court of Appeals, App. 15a-27a, is reported at *Barberton v. Jenney*, 2009 WL 1139347 (Ohio App. 9th Dist. 2009).

JURISDICTION

The opinion and judgment of the Supreme Court of Ohio was entered on June 2, 2010. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: [N]or shall any State deprive any person of life, liberty, or property without due process of law[.]

U.S. Const. amend. XIV, §1.

Section 4511.21 (D) of the Ohio Revised Code governs speed limits on a public street or highway in Ohio, and it provides:

No person shall operate a motor vehicle, trackless trolley, or streetcar upon a street or highway as follows:

> (1) At a speed exceeding fifty-five miles per hour, except upon a freeway as provided in divisions (B)(13) and (14) of this section;
>
> (2) At a speed exceeding sixty-five miles per hour upon a freeway as provided in divisions (B)(13) and (14) of this section;
>
> (3) If a motor vehicle weighing in excess of eight thousand pounds empty weight or a noncommercial bus as prescribed in division (B)(11) of this section, at a speed exceeding fifty-five miles per hour upon a freeway as provided in that division;
>
> (4) At a speed exceeding the posted speed limit upon a freeway for which the director has determined and declared a speed limit of not more than sixty-five miles per hour pursuant to division (L)(2) or (M) of this section;
>
> (5) At a speed exceeding sixty-five miles per hour upon a freeway for which such a speed limit has been established

> through the operation of division (L)(3) of this section;
>
> (6) At a speed exceeding the posted speed limit upon a freeway for which the director has determined and declared a speed limit pursuant to division (I)(2) of this section.

Ohio Rev. Code § 4511.21(D).

STATEMENT OF THE CASE

Petitioner Mark Jenney was convicted of a violation of Ohio Revised Code § 4511.21(D), to wit: Speeding, after a bench trial in the Barberton Municipal Court in Ohio. This petition concerns the Supreme Court of Ohio's decision that a police officer's unaided visual estimation of a vehicle's speed is sufficient evidence to support a conviction for speeding without independent verification of the vehicle's speed if the officer is trained, certified, and experienced in visually estimating vehicle speed.

This case presents a division in authority on an issue of substantial importance: whether a rule stating that a police officer's unaided visual estimation of a vehicle's speed is per se sufficient to prove the elements of speeding beyond a reasonable doubt.

Moreover, if the judgment of the Supreme Court of Ohio is permitted to stand, such precedent would serve as a "slippery slope" in a variety of criminal law matters where once required objectivity can be replaced with inconsistent and unreliable subjective determinations.

1. Factual Background

On July 3, 2008, Petitioner Mark Jenney was stopped by Officer Christopher R. Santimarino while traveling on State Route 21 in Copley Township, Ohio. App. 2a. After conducting the traffic stop, Officer Santimarino issued Mr. Jenney a citation for traveling seventy-nine (79) miles per hour in a sixty (60) mile per hour zone in violation of Ohio Revised Code § 4511.21. App. 3a.[1] Subsequently, the matter proceeded to trial in the Barberton Municipal Court. *Id.*

At trial, Officer Santimarino testified that he had estimated that Mr. Jenney's vehicle was traveling at seventy (70) miles per hour at the time he initiated a traffic stop. App. 4a. Officer Santimarino testified that he received training regarding visual estimations of speed when he was certified by the Ohio Peace Officer Training Academy (hereinafter "OPOTA") in 1995. App. 3a. In connection with his OPOTA certification, Officer Santimarino was required to demonstrate that he could visually estimate the speed of a vehicle within three (3) to four (4) miles per hour of the actual speed of the vehicle. *Id.* at 3a-4a. Officer Santimarino testified that since he began working in traffic

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[1] The trial court permitted the city to amend the citation to allege violations of both Ohio Rev. Code § 4511.21 (A) (operating a vehicle at a speed greater than is reasonable or proper) and § 4511.21 (D)(6) (operating a vehicle at a speed exceeding the posted speed limit). The Ninth District Court of Appeals affirmed the trial court's decision to grant the motion and the Supreme Court of Ohio declined to review the particular issue. App. 3a.

enforcement in 1995 he had performed hundreds of visual estimations. App. 4a.

Officer Santimarino also testified that his radar device indicated that Mr. Jenney was traveling eighty-two (82) or eighty-three (83) miles per hour. App. 15a-16a. Officer Santimarino testified that he was certified to operate the radar device in question. App. 19a. However, he did not produce any evidence of his certification beyond his testimony. *Id.*

At the conclusion of the city's case, Mr. Jenney made a Motion for judgment of acquittal pursuant to Ohio Crim. R. 29 arguing that evidence of an officer's visual estimation of speed, alone, is insufficient to sustain a conviction for speeding and therefore the city had failed to meet its burden of proof. App. 5a. The Motion was denied by the trial court and the defense proceeded with its case. *Id.*

Mr. Jenney testified that he had been traveling in the right hand lane of traffic and that he had been driving sixty (60) miles per hour, in compliance with the speed limit. *Id.* This testimony contradicted the testimony of Officer Santimarino. *Id.*

At the conclusion of the trial, the court amended the citation to state that Mr. Jenney was traveling seventy (70) miles per hour in a sixty (60) mile per hour zone and he was convicted of traveling over the speed limit in violation of Ohio Rev. Code § 4511.21(D)(6). *Id.*

2. The Decision of the Ohio Ninth District Court of Appeals

On appeal to the Ohio Ninth District Court of Appeals, Mr. Jenney argued that the trial court erred

when it permitted the city to amend the citation, that his conviction for speeding was not supported by sufficient evidence, and that the conviction was against the manifest weight of the evidence presented. *Id.* Mr. Jenney maintained that an officer's visual estimation of speed, absent other evidence, is not legally sufficient to sustain a conviction for speeding beyond a reasonable doubt. App. 5a-6a.

The Ohio Ninth District Court of Appeals held that the trial court erred in admitting Officer Santimarino's testimony regarding the results of the radar device. App. 6a. The court found that the city failed to prove Officer Santimarino was qualified to operate the device because he could not produce a copy of his certificate to operate the device at trial. *Id.* However, the Court held that the admission of testimony regarding the radar results was harmless error because Officer Santimarino's testimony alone regarding his visual estimation of Mr. Jenney's speed was sufficient to support the conviction. *Id.*

3. The Decision of the Supreme Court of Ohio

The Supreme Court of Ohio affirmed the decision of the Ohio Ninth District Court of Appeals. The Court held:

> [a] police officer's unaided visual estimation of a vehicle's speed is sufficient evidence to support a conviction for speeding in violation of R.C. 4511.21(D) without independent verification of the vehicle's speed if the officer is trained, is certified by the Ohio

> Peace Officer Training Academy or a similar organization that develops and implements training programs to meet the needs of law enforcement professionals and the communities they serve, and is experienced in visually estimating vehicle speed. App. 2a.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Ohio Supreme Court Conflicts with the Constitution of the United States of America

The Fourteenth Amendment to the United States Constitution provides that "[N]or shall any State deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV. That Amendment is the source of the federal courts' power to decide whether a defendant in a state proceeding received a fair trial. This Court has held that the Fourteenth Amendment to the United States Constitution imposes minimum standards of fairness on the states, and requires state criminal trials to provide defendants with protections "implicit in the concept of ordered liberty." *Danforth v. Minnesota*, 552 U.S. 264, 270 (2008), *citing Palko v. Connecticut*, 320 U.S. 319, 325 (1937). This essential requirement exacted of the states by the Due Process Clause provides protection against criminal trials that might be conducted in a manner amounting to a disregard of fundamental fairness. *Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944).

The type of infractions that violate 'fundamental fairness' have been narrowly defined

by this Court. *Dowling v. United States*, 493 U.S. 342, 352 (1990). This Court has routinely recognized that it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Speiser v. Randall*, 357 U.S. 513, 523 (1958); *see generally Patterson v. New York*, 432 U.S. 197, 201-202 (1977); *Leland v. Oregon*, 343 U.S. 790, 798 (1952); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). One such principle of justice embedded within the Due Process Clause of the Fourteenth Amendment is the requirement that the government establish a criminal defendant's guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986); *see also Spencer v. State of Texas*, 385 U.S. 554 (1967). This legal doctrine, which has been deemed fundamental to our system of jurisprudence and a basic tenet of a free society, is both a "requirement and a safeguard of due process of law in the historic, procedural context of due process." *Leland*, 343 U.S. at 802-803.

As this Honorable Court explained in *Jackson v. Virginia*, 443 U.S. 307 (1979), the standard of proof beyond a reasonable doubt, "plays a vital role in the American scheme of criminal procedure, because it operates to give 'concrete substance' to the presumption of innocence to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding." *Jackson*, 443 U.S. 307, 315

(*citing In re Winship*, 397 U.S. at 363). This Court explained that such a standard not only impresses upon the trier of fact the need to reach a "subjective state of near certitude" of the defendant's guilt, but also "symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself." *Id.* There is no express guarantee that an innocent party will never be forced to suffer the indignation of a wrongful conviction. However, the reasonable doubt standard represents the founding fathers' attempt to curtail the possibility of said occurrence. As this Court stated in *Randall*, *supra*:

> [t]here is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value – as a criminal defendant his liberty – this margin of error is reduced as to him by the process of placing on the other party the burden of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of convincing the factfinder of his guilt. To this end, the reasonable-doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue. *Randall*, 357 U.S. at 525-526.

Moreover, the reasonable doubt standard is of vital importance in maintaining citizens' confidence

in criminal law and procedure: "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *In re Winship*, 397 U.S. at 364. In essence, the reasonable doubt standard promotes confidence in the notion that one's government is prohibited from adjudging him guilty of a criminal offense without first convincing a proper trier of fact of his guilt with the utmost certainty. *Id.*

Other states that apply the "beyond a reasonable doubt standard" of proof for traffic infractions, and that have no independent statutory requirement for corroboration of an officer's visual estimation of speed, have reached differing conclusions. *See generally Ferguson v. State*, 587 S.E.2d 195 (Ga. Ct. App. 2003)(wherein the Georgia Court of Appeals held that an officer's visual estimate of speed is sufficient proof in and of itself); *State v. Estes*, 223 P.3d 287 (Idaho Ct. App. 2010)(Idaho Court of Appeals held that police officer's testimony as to his visual estimation of speed, standing alone, was insufficient proof of speeding infraction); *United States v. Monzon-Gomez*, 244 Fed.Appx. 954 (11th Cir. 2007)(Opining that an officer's visual observation alone, unaccompanied by evidence of speeding generated by a properly tested "speed measuring device," would be insufficient as an evidentiary matter to successfully prosecute a speeding violation in court under Alabama law).

Other courts that have addressed the issue have conducted a more fact-intensive, case-specific inquiry. For example, Minnesota courts have considered the rate of error in visual estimates in relation to the alleged speeding infraction to

determine whether the evidence is sufficient. *State v. Ali*, 679 N.W. 2d 359 (Minn. Ct. App. 2004)(sufficient evidence to sustain speeding conviction where five (5) mile per hour margin of error would still result in violation). Likewise, the New York Court of Appeals upheld a defendant's speeding violation based solely upon an officer's estimation where said estimation was twenty (20) to twenty-five (25) miles per hour over the posted speed limit. *People v. Olsen*, 292 N.Y.S.2d 420 (N.Y. App. Div. 1968). The Court cautioned against the adoption of a per se rule, however, explaining that:

> [a] police officer's estimate that a defendant was traveling at fifty (50) to fifty-five (55) miles per hour in a thirty (30) mile an hour zone should be sufficient to sustain a conviction for speeding. On the other hand, his testimony, absent mechanical corroboration, that a vehicle was proceeding at thirty-five (35) to forty (40) miles per hour in the same zone might for obvious reason be insufficient, since, it must be assumed that only a mechanical device could detect such a slight variance with accuracy sufficient to satisfy the burden necessary to sustain a conviction. *Id.* at 232.

The Missouri Supreme Court reached a similar conclusion in *City of Kansas City v. Oxley*, 579 S.W.2d 113 (Mo. 1979), reversing the defendant's conviction where the forty-five (45) mile per hour speed estimation was only ten (10) miles per hour over the posted limit of thirty-five (35) miles per hour.

Other states have opted to address the issue statutorily. Pennsylvania, for instance, has mandated that a conviction for speeding in circumstances similar to the matter sub judice requires utilization of speed timing devices to sustain a conviction. *See* 75 Pa. Cons. Stat. § 3368; *see also Commonwealth v. Martorano*, 563 A.2d 1229 (Pa. Super. Ct. 1989). The Superior Court did imply that, in the absence of the above-referenced legislation, Pennsylvania would adopt the ideology of the Missouri courts, referencing *Oxley*, *supra*, and *City of Jackson v. Langford*, 648 S.W.2d 927 (Mo. Ct. App. 1983). *Martorano*, 563 A.2d at 1232-1233; *see also Commonwealth v. Cohen*, 605 A.2d 814 (Pa. Super. Ct. 1992).

In the instant matter, Petitioner's conviction was based entirely upon the testimony of Officer Santimarino. Officer Santimarino first asserted that he had received training that enabled him to visually estimate the speed of a vehicle. App. 3a-4a. He further stated that he had employed said training hundreds of times throughout his thirteen (13) year career. App. 4a. As it pertains to Petitioner, the officer testified that based upon his training and experience, he had estimated that Petitioner's vehicle was travelling seventy (70) miles per hour at the time in question. *Id.*

Officer Santimarino also testified concerning his utilization of a Python brand Doppler radar unit in the case. *Id.* He observed that the radar unit indicated that Petitioner's vehicle was travelling at eighty-two (82) miles per hour. *Id.* Because he was unable to produce a copy of his radar-training certification at trial, his testimony concerning the radar unit – and its results – were ultimately

deemed inadmissible. *Id.* Despite the discrepancy between his initial visual estimation and the results of the radar unit, Officer Santimarino issued a citation for travelling seventy-nine (79) miles per hour in a sixty (60) mile per hour zone in violation of Ohio Revised Code Section 4511.21(D). App. 4a-5a. Based on Officer Santimarino's visual estimation, which the trial court found to be his "strongest testimony," the court amended the citation to state that Petitioner was travelling seventy (70) miles per hour in a sixty (60) mile per hour zone. App. 5a.

The Supreme Court of Ohio accepted review of the case to determine whether a police officer's unaided visual estimation of a vehicle's speed provides sufficient evidence, in and of itself, to support a conviction. The Supreme Court of Ohio concluded that a police officer's unaided visual estimation of a vehicle's speed is sufficient evidence to support a conviction for speeding in violation of Ohio Rev. Code § 4511.21(D) without independent verification of the vehicle's speed if the officer is trained, is certified by the OPOTA or a similar organization, and is experienced in visually estimating vehicle speed. App. 12a.

It is respectfully submitted that the Court's holding deprives Petitioner – and individuals in similar situations – of the constitutional right to Due Process. In essence, the Court has created a per se rule whereby testimony from a duly-trained officer is sufficient, in and of itself, to sustain a conviction for speeding under Ohio's Revised Code. In other words, a police officer's visual estimation of a defendant's speed is now sufficient to constitute proof beyond a reasonable doubt of a defendant's guilt.

Although the Court maintains that the trier of fact is still permitted to assess the officer's credibility, the practical effect of the Court's decision is to render a defendant's conviction a foregone conclusion. As Supreme Court of Ohio Justice O'Donnell aptly noted in his dissenting opinion: "a broad standard as postulated by the majority that a trained, certified, and experienced officer's estimate of speed is sufficient evidence to support a conviction for speeding eclipses the role of the fact-finder to reject such testimony..." App. 13a-14a.

The Court has effectively relieved the Government of its obligation to prove each element of the charged offense beyond a reasonable doubt. In order to establish a violation of Ohio Rev. Code § 4511.21(D), the Government is required to prove that the defendant operated a motor vehicle in excess of the posted speed limit, to wit: sixty (60) miles per hour. A plain and logical reading of the statutory text clearly establishes that the exact speed of the vehicle – in this case, over sixty (60) miles per hour – is an element of the offense. At the very least, the Government is required to show that Petitioner's speed exceeded that which has been provided by statute.

The testimony herein at issue simply fails to satisfy this requirement. By its very nature, Officer Santimarino's testimony is merely an estimate.[2] He

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[2] As the Maryland Court of Appeals noted in *Baltimore & Ohio Railroad Co. v. Wright*, 84 A.2d 851, 855 (Md. 1951), "[a police officer's visually-estimated speed] is necessarily an approximate and not exact, for without mechanical aid it is manifestly impossible for anyone, expert or non-expert, to estimate

expressly confirmed this fact during trial, noting that his visual estimation is within three (3) to four (4) miles per hour of the vehicle's actual speed. Assuming, without accepting, the validity and accuracy of visual estimations, police officers with similar training are unable to state that an individual's speed exceeded the prescribed limits, at least to the degree of certainty required by the United States Constitution.[3]

One can certainly envision a scenario whereby the defendant is charged with violating the same provision as Petitioner for travelling sixty-three (63) miles per hour. Per the Officer's own testimony, his estimation could be unjustifiably enhanced by three (3) to four (4) miles per hour. That is, the defendant may actually have been travelling at or below the posted speed limit. Certainly, the trier of fact would be justified in determining that the Government failed to sustain its burden of proof beyond a reasonable doubt. Under the Supreme Court of Ohio's rationale, however, the officer's testimony would be per se sufficient to support the defendant's conviction.

The problematic nature of the Court's theory is further complicated when considering the potential enhanced penalties that apply in traffic cases under the Ohio Revised Code. For instance, Ohio Rev. Code § 4510.036(C)(11)(a)-(d) mandates enhanced

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precisely the speed of a moving object, and that fact is assumed by everyone possessing ordinary common sense."

[3] This issue is further compounded when one considers that Officer Santimarino's initial unaided visual estimation was seventy (70) miles per hour, although he issued a citation for seventy-nine (79) miles per hour after consulting his radar unit.

penalties – in the form of points assessed to a driver's license record – that are dependent upon the exact speed of the vehicle.[4] Additionally, a driver could be subject to incarceration should the allegation constitute a subsequent offense within a certain period of time. *See* Ohio Rev. Code § 4511.20(B). Local municipalities are also permitted to enhance or grade the particular fine that may be imposed relative to the exact miles per hour that a vehicle is travelling over the prescribed limit.

This Honorable Court has generally held that a fact which "increase[s] the prescribed range of penalties to which a criminal defendant is exposed" is an element of a crime, *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), and, as such, necessitates that the Government establish its existence by proof beyond a reasonable doubt. As discussed *supra*, application of the Supreme Court of Ohio's rationale will subvert the Due Process principles that have been historically espoused, required and protected by this Court's decisions.

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[4] In the case at bar, Officer Santimarino indicated that he reduced the rate of speed on Petitioner's citation to seventy-nine (79) miles per hour to give Petitioner a break on the personal appearance in court, which is required for speeds in excess of twenty (20) miles per hour over the posted speed limit. Had the trial court applied the Supreme Court of Ohio's rationale, Petitioner would have been subjected, at a minimum, to a two (2) point assessment on his driver's license record.

II. The Decision of the Supreme Court of Ohio Will Serve as a Slippery Slope by Allowing Subjective Determinations to Replace Objective Reliability in a Variety of Criminal Offense Allegations

The instant case merits this Honorable Court's review because current precedential value of this case has the potential of circumventing long-standing threshold requirements for the admission of evidence. Historically, the trier of fact has been presented with objective facts by way of scientific identifications and/or measurements. For instance, in a trial pertaining to the possession of illegal substances, namely cocaine for example, a trial court requires more than an officer's testimony that a white powder that was seized in a high crime area is cocaine – premised simply upon only the officer's training, certification and experience. Of course, corroboration is mandated to authenticate the substance. Such evidence is admissible as evidence only after offering laboratory results in open court. *See Melendez-Diaz v. Massachusetts,* 129 S.Ct. 2527 (2009).

If the decision of the Supreme Court of Ohio is not overturned, it will create a slippery slope that may allow for the utilization of evidence that has not been subject to objective scrutiny and independent reliable testing. In addition to the example above, the petitioner respectfully submits the following additional examples: In a sexual assault case, a government investigator may opine that the alleged victim's conduct, when coupled with the surrounding identifiable circumstances, to them, supports the investigator's belief that the person was in fact

victimized. The officer is only required to share his or her training, certification, and the fact that the officer has been involved in other similar investigations. A rape kit test and/or DNA testing would not then be necessary to be used in the investigation. Similarly, an officer in possession of green leafy vegetative matter would no longer need to have a scientific laboratory ensure that the substance tested positive as an illegal substance because the officer's training and experience would be sufficient.

This chilling precedent carries over into the vast majority of criminal allegations. Whether it is a case of arson, a case of physical violence, a claim of sexual abuse, or any other number of conduct types, a United States citizen must enjoy the right to have evidence which is fair and reliable considered. Presently, it has been exposed in our criminal justice system that common scientific tests and methodologies are flawed.[5] This has led to the

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[5] In 2009, the National Academy of Sciences released a comprehensive report regarding the unreliability of forensic evidence used within the criminal justice system. The report concluded that the legal systems' admission of and reliance upon forensic evidence in criminal trials should be guided by two (2) factors: (1) the extent to which the forensic science discipline is founded on a reliable scientific methodology that assists it in accurately analyzing evidence and reporting findings; and (ii) the extent to which the forensic science discipline relies on human interpretation that could be tainted by error, bias, or the absence of reliable procedures, protocols and standards. Committee on Identifying the Needs of the Forensic Science Community, National Research Council of the

incarceration of innocent citizens as well as the release of those that are not innocent. Realistically, there are no absolutes in the legal system and any human system will always have a margin of error. We need not, however, increase the likelihood of wrongful convictions or exonerations by lowering the standard of evidence that a trier of fact should consider when weighing the fate of an individual.

CONCLUSION

In essence, the Ohio Supreme Court's Opinion has rendered the adversarial proceedings in speeding ticket cases a mere formality and an exercise in futility. A defendant in Petitioner's predicament will be confronted with the unfortunate realization that his conviction was predetermined the moment that the officer was deemed competent to offer testimony concerning the ultimate issue, to wit: the speed of the vehicle. This is not the meaningful adversarial system that this Honorable Court has labored to create and sought to protect. Rather, it represents a reversion to the traditional English form of justice that served as the genesis for the adoption of the Bill of Rights.

Precedent case law that has affirmed a defendant's constitutional right to counsel and, in turn, to a fair trial, has reasoned that a criminal defendant's most basic right is his right to a fair trial at which the witnesses against him might be

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National Academies, *Strengthening Forensic Science in the United States: A Path Forward* (2009).

meaningfully cross-examined. *United States v. Wade*, 388 U.S. 218, 224 (1967).

This Honorable Court has the opportunity to rectify the Supreme Court of Ohio's evisceration of Petitioner's Due Process rights. By overturning the decision, this Honorable Court will ensure that all individuals subjected to criminal prosecution are given Due Process of law and a fair trial, even in the most seemingly inconsequential proceedings.

Respectfully, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

CITY OF BARBERTON, APPELLEE,
v.
JENNEY, APPELLANT.

A police officer's unaided visual estimation of a vehicle's speed is sufficient evidence to support a conviction for speeding in violation of R.C. 4511.21(D) without independent verification of the vehicle's speed if the officer is trained, certified, and experienced in visually estimating vehicle speed.

(Supreme Court of Ohio, No. 2009-1069 — Submitted February 17, 2010 — Decided June 2, 2010.)

APPEAL from the Court of Appeals for Summit County, No. 24423, 2009-Ohio-1985.

SYLLABUS OF THE COURT

A police officer's unaided visual estimation of a vehicle's speed is sufficient evidence to support a conviction for speeding in violation of R.C. 4511.21(D) without independent verification of the vehicle's speed if the officer is trained, is certified by the Ohio Peace Officer Training Academy or a similar organization that develops and implements training programs to meet the needs of law-enforcement professionals and the communities they serve, and is experienced in visually estimating vehicle speed.

O'CONNOR, J.

{¶ 1} In this appeal, we determine whether a police officer's unaided visual estimation of a vehicle's speed, by itself, is sufficient evidence of the vehicle's

speed to support a conviction for speeding in violation of R.C. 4511.21(D). Appellant, Mark Jenney, argues that it is impossible for a police officer to visually estimate the exact speed of a moving object. He asks the court to establish a bright-line rule that an officer's visual estimation of speed, without other evidence to support it, is insufficient to sustain a conviction for speeding.

{¶ 2} A rational trier of fact could find testimony by a police officer who is trained, certified by the Ohio Peace Officer Training Academy ("OPOTA") or a similar organization, and experienced in visually estimating vehicle speed that he estimated a vehicle's speed to be in excess of the posted limit sufficient evidence to establish a violation of R.C. 4511.21(D) beyond a reasonable doubt. We therefore hold that a police officer's unaided visual estimation of a vehicle's speed is sufficient evidence to support a conviction for speeding in violation of R.C. 4511.21(D) without independent verification of the vehicle's speed if the officer is trained, is certified by the Ohio Peace Officer Training Academy or a similar organization that develops and implements training programs to meet the needs of law-enforcement professionals and the communities they serve, and is experienced in visually estimating vehicle speed.

Relevant Background

{¶ 3} On July 3, 2008, Officer Christopher R. Santimarino was in a marked patrol car running stationary radar at southbound traffic on State Route 21 in Copley Township, Ohio. The posted speed limit

in that location is 60 miles per hour. Santimarino observed Jenney driving a black SUV in the left lane of Route 21 in moderate to heavy traffic. Santimarino determined that Jenney was traveling faster than the posted speed limit, initiated a traffic stop, and issued Jenney a citation for traveling 79 miles per hour in a 60-mile-per-hour zone in violation of R.C. 4511.21.[1]

{¶ 4} The case proceeded to trial in the Barberton Municipal Court.

{¶ 5} At trial, Santimarino testified that he had been employed as a patrolman with the Copley Police Department for 13 years. He testified that he was certified by OPOTA and had been working in traffic enforcement since 1995. Santimarino testified that as part of his OPOTA training, he was trained to visually estimate the speed of a vehicle. In order to be certified by OPOTA, Santimarino was required to show that he could visually estimate a vehicle's speed

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[1] In issuing the citation, Santimarino inadvertently failed to check any of the boxes specifying under which subsection Jenney was charged, but the trial court permitted the state to amend the citation to allege that Jenney violated both R.C. 4511.21(A) (operating a motor vehicle at a greater speed than is reasonable and proper under the circumstances) and 4511.21(D)(6) (operating a motor vehicle at a speed exceeding the posted speed limit). On appeal, the Ninth District Court of Appeals affirmed the trial court's grant of the city's motion to amend the citation. *Barberton v. Jenney*, Summit App. No. 24423, 2009-Ohio-1985, 2009 WL 1139347, ¶ 4. We declined to review Jenney's proposition relating to the amendment. *Barberton v. Jenney*, 123 Ohio St.3d 1406, 2009-Ohio-5031, 914 N.E.2d 204.

to within three to four miles per hour of the vehicle's actual speed, which he did. Further, Santimarino testified that since becoming a police officer in 1995, he had performed hundreds of visual estimations. Santimarino testified that based on his training and experience, he had estimated that Jenney's vehicle was traveling 70 miles per hour on July 3, 2008.

{¶ 6} Santimarino also testified that in addition to his training and experience in visually estimating vehicle speed, he was trained and certified to use the Python brand Doppler radar unit that he was using on July 3, 2008. Santimarino testified on direct examination that after he visually estimated the speed of Jenney's vehicle, he observed that the radar unit indicated that Jenney's vehicle was traveling at 82 miles per hour.[2] Santimarino could not produce a copy of his radar-training certification when defense counsel requested he do so on the day of trial.

{¶ 7} Santimarino also testified that Jenney was traveling at an unreasonable speed for the conditions, given the other traffic in close proximity to his vehicle.

{¶ 8} In light of both his visual estimation and the radar reading, Santimarino initiated a traffic stop and issued Jenney a citation for traveling 79 miles per

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[2] Santimarino testified on cross-examination that the radar unit indicated that Jenney's vehicle was traveling at 83 miles per hour. This difference is immaterial to our analysis.

hour in a 60 mile per hour zone in violation of R.C. 4511.21. Santimarino testified that he reduced the rate of speed to 79 miles per hour to "give [Jenney] a break on the personal appearance in court," which is required for speeds 20 miles per hour or more over the speed limit.

{¶ 9} At the conclusion of the city's case, Jenney moved for an acquittal pursuant to Crim.R. 29, arguing that the city had failed to meet its burden of proof. The trial court overruled Jenney's motion. Jenney then testified that before he was pulled over, he had been traveling in the right lane of traffic, not the left lane as Santimarino had testified, and that he had been traveling at the speed limit, 60 miles per hour.

{¶ 10} The trial judge found Jenney guilty of traveling over the posted speed limit. Based on Santimarino's visual estimation, which the trial court found to be his "strongest" testimony, the court amended the citation to state that Jenney had been traveling 70 miles per hour in a 60-mile-per-hour zone and imposed a $50 fine plus court costs.

{¶ 11} Jenney appealed his conviction to the Ninth District Court of Appeals, arguing that the trial court had erroneously permitted the city to amend the traffic citation and that his conviction was not supported by sufficient evidence and was against the manifest weight of the evidence. Jenney argued that the radar results were not admissible because the city had failed to establish a proper foundation for admission. Jenney maintained that without the

radar results, the city had failed to present sufficient evidence of his speed and his conviction could not stand. The court of appeals held that because Santimarino could not produce his certificate to operate the radar unit on the day of trial, the state had not proved that he was qualified to operate the radar unit and the trial court had erred in permitting him to testify regarding the radar results.[3] Id., ¶ 8. However, the Ninth District held that the admission of Santimarino's testimony regarding the radar results was harmless error because his visual estimation of the vehicle's speed was sufficient to support Jenney's conviction. Id., ¶ 9.

{¶ 12} We accepted review of Jenney's discretionary appeal to determine whether a police officer's unaided visual estimation of a vehicle's speed, by itself, is sufficient to support a conviction for violation of R.C. 4511.21(D). *Barberton v. Jenney*, 123 Ohio St.3d 1406, 2009-Ohio-5031, 914 N.E.2d 204. We hold that a police officer's unaided visual estimation of a vehicle's speed is sufficient evidence to support a conviction for speeding in violation of R.C. 4511.21(D) without independent verification of the vehicle's speed if the officer is trained, is certified by the Ohio Peace Officer Training Academy or a similar organization that develops and implements training

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[3] The city did not appeal the Ninth District's decision that the radar results were inadmissible. Because the issue is not before us, we do not consider whether Santimarino's testimony regarding his training and certification in operating the radar unit was sufficient evidence to prove that he was qualified to operate the unit.

programs to meet the needs of law-enforcement professionals and the communities they serve, and is experienced in visually estimating vehicle speed.

Analysis

{¶ 13} The trial court found appellant guilty of "traveling over the speed limit." Pursuant to R.C. 4511.21(D)(6), "[n]o person shall operate a motor vehicle * * * upon a street or highway * * * [a]t a speed exceeding the posted speed limit * * *." Jenney does not dispute that he was operating a motor vehicle on a street or highway and that the posted speed limit was 60 miles per hour. The only element of the offense that Jenney challenges as not supported by sufficient evidence is the speed at which he was driving.

{¶ 14} " ' "[S]ufficiency" is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law.' " *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541, quoting Black's Law Dictionary (6th Ed.1990) 1433. "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." Id. In reviewing a challenge to the sufficiency of the evidence, " '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 113,

quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 15} "Visual observation has long been held a valid means of determining the speed of a moving vehicle as long as the witness has a reliable opportunity to view the vehicle." *State v. Harkins* (Aug. 5, 1987), 4th Dist. No. 431, 1987 WL 15492, at *3. A majority of the appellate districts that have considered the issue have held that an officer's testimony that in his opinion, a defendant was traveling in excess of the speed limit is sufficient to sustain a conviction for speeding. *Kirtland Hills v. Logan* (11th Dist.1984), 21 Ohio App.3d 67, 69, 21 OBR 71, 486 N.E.2d 231; *State v. Dawson*, 5th Dist. No. 03COA-061, 2004-Ohio-2324, ¶ 21-23; *Cincinnati v. Dowling* (1st Dist.1987), 36 Ohio App.3d 198, 199-200, 521 N.E.2d 1140; *State v. Gellenbeck*, 12th Dist. No. CA2008-08-030, 2009-Ohio-1731, 2009 WL 975746, ¶ 19-20; *Columbus v. Bravi* (Mar. 5, 1991), 10th Dist. No. 90AP-1135, 1991 WL 33095; *State v. Wilson* (Nov. 20, 1996), 9th Dist. No. 95CA006285, 1996 WL 668993, at *1. In so holding, many of these courts have considered the testifying officer's training and experience visually estimating vehicle speed. *Dawson* at ¶ 21-23 (noting that the trooper had received training at the Ohio Highway Patrol Academy on how to accurately estimate the speed of moving vehicles, had passed the test at the academy, and had been a trooper for four and a half years); *Dowling* at 199-200 (noting that the officer was trained in visually estimating vehicle speed and had 29 years of experience); *Gellenbeck* at ¶ 19-20 (noting that the trooper testified regarding his training to

accurately visually estimate vehicle speed); *Kirtland Hills* at 69 (noting that the officer's testimony regarding his visual estimation was based on his knowledge and expertise).

{¶ 16} Jenney relies on decisions by the Second, Third, and Eighth Districts to support his argument that an officer's visual estimation of a vehicle's speed, alone, is insufficient to support a conviction pursuant to R.C. 4511.21(D). *See Middleburg Hts. v. Campbell*, 8th Dist. No. 87593, 2006-Ohio-6582, 2006 WL 3630780; *State v. Saphire* (Dec. 8, 2000), 2d Dist. No. 2000 CA 39, 2000 WL 1803852; *State v. Meyers* (Dec. 29, 2000), 2d Dist. No. 2000 CA 49, 2000 WL 1879104; *State v. Westerbeck* (June 19, 1987), 3d Dist. No. 17-86-18, 1987 WL 13063.

{¶ 17} The Eighth District held that an officer's visual estimation of a vehicle's speed, alone, is insufficient to support a conviction for speeding, stating that "the mere educated guess of the arresting officer as to the speed of a vehicle is insufficient to overcome the presumption of innocence and the burden of proof beyond a reasonable doubt for conviction." *Campbell*, 2006-Ohio-6582, ¶ 15.

{¶ 18} Although Jenney's reliance on the Eighth District's decision in *Campbell* is sound, his reliance on the Second District's decisions in *Saphire* and *Meyers* and the Third District's decision in *Westerbeck* is misplaced. After its decisions in *Saphire* and *Meyers*, the Second District held that testimony regarding an officer's visual estimation of

speed, alone, may be sufficient to support a conviction for speeding upon an adequate showing of the officer's training and ability to accurately visually estimate the speed of vehicles. *State v. Konya*, 2d Dist. No. 21434, 2006-Ohio-6312, 2006 WL 3462119, ¶ 7-8, 14. In *Konya*, the court held that based on the trooper's 12 years of experience in law enforcement and extensive training in visually estimating the speed of vehicles, along with the fact that he had had an unobstructed view of the vehicle in question for more than a mile, his testimony was sufficient, in and of itself, to establish the defendant's speed. Id. Similarly, the Third District recently explained that its decision in *Westerbeck* is limited to cases in which the officer's testimony is "too vague and indefinite for a finding of guilt," stating that courts that have interpreted *Westerbeck* as holding that visual-estimation testimony is insufficient as a matter of law have misconstrued its holding. *State v. Harris*, 3d Dist. No. 909-03, 2009-Ohio-2616, 2009 WL 1579250, ¶ 13, fn. 3.

{¶ 19} The Eighth District stands alone in holding that an officer's visual estimation of the speed of a vehicle is insufficient to support a finding of guilt, and we agree with the courts that have found the opposite. Rational triers of fact could find a police officer's testimony regarding his unaided visual estimation of a vehicle's speed, when supported by evidence that the officer is trained, certified by OPOTA or a similar organization, and experienced in making such estimations, sufficient to establish beyond a reasonable doubt the defendant's speed. Independent verification of the vehicle's speed is not

necessary to support a conviction for speeding.

{¶ 20} The officer's credibility remains an issue for the trier of the facts. *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 120, quoting *State v. DeHass* (1967), 10 Ohio St.2d 230, 39 O.O.2d 366, 227 N.E.2d 212, paragraph one of the syllabus. "Because the trier of fact sees and hears the witnesses and is particularly competent to decide 'whether, and to what extent, to credit the testimony of particular witnesses,' we must afford substantial deference to its determinations of credibility." *Konya*, 2006-Ohio-6312, ¶ 6, quoting *State v. Lawson* (Aug. 22, 1997), 2d Dist. No. 16288, 1997 WL 476684, *4.

{¶ 21} At the time of the traffic stop, Santimarino had been employed as a patrolman with the Copley Police Department for 13 years. He is trained to visually estimate vehicle speed to within three to four miles per hour of the vehicle's actual speed, he is certified by OPOTA in visually estimating vehicle speed, and he has performed hundreds of visual estimations since becoming a police officer in 1995. Santimarino testified that based on his training and experience, he visually estimated that Jenney was traveling 70 miles per hour at the time of the traffic stop. Santimarino's testimony was sufficient to support Jenney's conviction for traveling at a speed above the posted limit in violation of R.C. 4511.21(D). Further, the trial court found Santimarino's testimony credible and based its finding of guilt on the officer's visual estimation, noting that his testimony on the estimated speed was his "strongest" testimony.

{¶ 22} Given Santimarino's training, OPOTA certification, and experience in visually estimating vehicle speed, his estimation that Jenney was traveling 70 miles per hour was sufficient to support Jenney's conviction for driving over the posted speed limit of 60 miles per hour in violation of R.C. 4511.21(D).

Conclusion

{¶ 23} A police officer's unaided visual estimation of a vehicle's speed is sufficient evidence to support a conviction for speeding in violation of R.C. 4511.21(D) without independent verification of the vehicle's speed if the officer is trained, is certified by the Ohio Peace Officer Training Academy or a similar organization that develops and implements training programs to meet the needs of law-enforcement professionals and the communities they serve, and is experienced in visually estimating vehicle speed. Given Santimarino's training, OPOTA certification, and experience in visually estimating vehicle speed, his estimation that Jenney was traveling at 70 miles per hour was sufficient to support a conviction for driving over the posted speed limit of 60 miles per hour in violation of R.C. 4511.21(D). We therefore affirm the judgment of the court of appeals and uphold Jenney's conviction and fine.

Judgment affirmed.

PFEIFER, LUNDBERG STRATTON, LANZINGER, and CUPP, JJ., concur.
O'DONNELL, J., dissents.

BROWN, C.J., not participating.

O'DONNELL, J., dissenting.

{¶ 24} I respectfully dissent.

{¶ 25} While a police officer who is trained, certified by the Ohio Peace Officer Training Academy, and experienced in estimating a vehicle's speed may, as any other expert witness, offer an opinion of the speed of a moving vehicle during testimony in a court proceeding, I do not agree that such testimony per se is sufficient evidence to support a conviction for speeding. Like any other witness, a police officer's credibility is to be determined by the jury or other fact-finder. *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 120, quoting *State v. DeHass* (1967), 10 Ohio St.2d 230, 39 O.O.2d 366, 227 N.E.2d 212, paragraph one of the syllabus (" '[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts' "). In fact, jury instructions given regularly by trial judges advise that a jury is privileged to believe all, part, or none of the testimony of any witness. See, e.g., *State v. Group*, 98 Ohio St.3d 248, 2002-Ohio-7247, 781 N.E.2d 980, ¶ 120 (citing jury instruction stating that jurors may believe or disbelieve all or any part of the testimony of any witness).

{¶ 26} Thus, I would assert that a broad standard as postulated by the majority that a trained, certified, and experienced officer's estimate of speed is sufficient evidence to support a conviction for

speeding eclipses the role of the fact-finder to reject such testimony, and thus such testimony, if found not to be credible, could, in some instances, be insufficient to support a conviction.

Michelle Banbury, City of Barberton Law Department Assistant Prosecuting Attorney, for appellee.

John Kim, for appellant.

Richard Cordray, Attorney General, Benjamin C. Mizer, Solicitor General, and Emily S. Schlesinger, Deputy Solicitor, urging affirmance for amicus curiae, Ohio Attorney General.

STATE OF OHIO)		IN THE COURT OF
) ss:		APPEALS NINTH
COUNTY OF)		JUDICIAL DISTRICT
SUMMIT)		
CITY OF BARBERTON)		C.A. No. 24423
)		
Appellee)		
)		
v.)		APPEAL FROM
)		JUDGMENT
MARK W. JENNEY)		ENTERED IN THE
)		BARBERTON
Appellant)		MUNICIPAL
)		COURT COUNTY
)		OF SUMMIT, OHIO
)		CASE No.
)		08TRD4989

DECISION AND JOURNAL ENTRY

Dated: April 29, 2009

DICKINSON, Judge.

INTRODUCTION

{¶1} Officer Christopher Santimarino issued Mark Jenney a traffic citation after observing Mr. Jenney driving faster than the posted speed limit. According to Officer Santimarino, he estimated Mr. Jenney was traveling 70 miles per hour in a 60 mile per hour zone. His radar device clocked Mr. Jenney

as traveling either 82 or 83 miles per hour. The municipal court convicted Mr. Jenney of speeding, finding that he had been going 70 miles per hour. Mr. Jenney has appealed, arguing that the municipal court incorrectly allowed the City of Barberton to amend the traffic citation at trial, that his conviction is not supported by sufficient evidence, and that his conviction is against the manifest weight of the evidence. This Court affirms because the municipal court properly allowed the City to amend the citation, Officer Santimarino's testimony was sufficient to support his conviction, and his conviction is not against the manifest weight of the evidence.

CITATION AMENDMENT

{¶2} Mr. Jenney's first assignment of error is that the municipal court incorrectly allowed the City to amend the traffic citation at the beginning of trial. When Officer Santimarino issued the citation, he wrote that Mr. Jenney had been traveling 79 miles per hour in a 60 mile per hour zone, in violation of Section 4511.21 of the Ohio Revised Code. He forgot to mark a box on the citation form indicating that Mr. Jenney's speed was over the limit or a box indicating that Mr. Jenney's speed was unreasonable for the conditions. Mr. Jenney has argued that, since the boxes were not marked, he did not know whether he was being charged under Section 4511.21(A), which prohibits operating "a motor vehicle . . . at a speed greater . . . than is reasonable or proper," or Section 4511.21(D), which prohibits operating "a motor vehicle . . . [a]t a speed exceeding the posted speed limit . . . ." R.C. 4511.21(A), (D)(6).

{¶3} Mr. Jenney's argument fails because the municipal court correctly allowed the City to amend the citation. Rule 7(D) of the Ohio Rules of Criminal Procedure provides that "[t]he court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged." "[B]ecause traffic citations need not be the product of grand jury action, they 'should be amendable to cure defects more readily than felony indictments.'" *State v. Dunlap*, 9th Dist. No. 97CA006859, 1998 WL 332944 at *2 (June 24, 1998) (quoting *City of Cleveland Heights v. Perryman*, 8 Ohio App. 3d 443, 445 (1983)). The City "may amend a traffic ticket that omits necessary information or includes a clerical error as long as: (1) the original traffic ticket gave the defendant notice of the true nature of the offense; (2) the defendant was not deprived of a reasonable opportunity to prepare a defense; and (3) the amendment merely clarifies or amplifies the information in the original ticket." *Id.* (citing *Perryman*, 8 Ohio App. 3d at 446).

{¶4} On the citation, Officer Santimarino identified the correct statutory provision, Section 4511.21, which deals with speed limits. Mr. Jenney, therefore, had "notice of the true nature of the offense." *Id.* The amendment merely clarified which subsection the City thought applied. In addition, the municipal court did not deprive Mr. Jenney "of a reasonable opportunity to prepare a defense." It told him that, if he needed additional time for his defense

because of the amendment, it "would be glad to continue the case." *Id.* Mr. Jenney declined the court's offer. His first assignment of error is overruled.

MOTION FOR ACQUITTAL

{¶5} Mr. Jenney's second assignment of error is that the municipal court incorrectly denied his motion for acquittal. Under Rule 29(A) of the Ohio Rules of Criminal Procedure, a defendant is entitled to acquittal on a charge against him "if the evidence is insufficient to sustain a conviction . . . ." Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo. *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997); *State v. West*, 9th Dist. No. 04CA008554, 2005-Ohio-990, at ¶33. This Court must determine whether, viewing the evidence in a light most favorable to the prosecution, it could have convinced an average juror of Mr. Jenney's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St. 3d 259, paragraph two of the syllabus (1991).

{¶6} Mr. Jenney has argued that the municipal court should have granted his motion because the City failed to establish a proper foundation for admission of the reading from the Python radar device that Officer Santimarino used to determine his speed. "In general, a velocity reading made by a speed detection device is authenticated by evidence of three specific things. First, the device 'must be accepted as dependable for the proposed purpose by the profession concerned in that branch of science[.]' . . . Second, the [City] must show that the device used was

an accepted type and in good condition for accurate work. . . . Finally, the witness using the device must be qualified to operate the device through training and experience." *State v. Jamnicky*, 9th Dist. No. 03CA0039, 2004-Ohio-324, at ¶7 (quoting *City of East Cleveland v. Ferell*, 168 Ohio St. 298, 301 (1958)).

{¶7} Mr. Jenney has argued to this Court that the City failed to present any evidence regarding the dependability of the Python device or of Officer Santimarino's qualifications to use it. At trial, Mr. Jenney objected to Officer Santimarino's testimony, arguing that he was not qualified to operate the Python device. He cross-examined Officer Santimarino about his qualifications to use the Python device and contested whether the device was calibrated properly. He did not, however, contest the scientific reliability of the Python device itself. Accordingly, he has forfeited his challenge to the dependability of the Python device and, therefore, this Court will only consider his argument that the City failed to show that Officer Santimarino was qualified to use the device. *Id.* at ¶13; *State v. Brown*, 9th Dist. No. 02CA0034-M, 2002-Ohio6463, at ¶8.

{¶8} Although Officer Santimarino testified that he is certified to operate the device, he did not produce any evidence of that fact beyond his testimony. Testimony by a law enforcement officer that "he was trained on the radar unit" is insufficient to establish that he is qualified to operate it. *Brown*, 2002-Ohio-6463, at ¶12. "Absent further evidence, such as a certificate of training, [this Court] cannot say that the [City] demonstrated that [Officer Santimarino] was qualified to operate the radar unit."

Id. The municipal court, therefore, incorrectly permitted him to testify about how fast the device indicated Mr. Jenney was traveling.

{¶9} Although the municipal court should not have let Officer Santimarino testify about the speed the radar device indicated Mr. Jenney was traveling, it did not convict Mr. Jenney solely on that evidence. The court explained that "what I'm going to do is take everything as a whole, and I'm going to find Mr. Jenney guilty of traveling over the speed limit. However, what I'm going to do is I'm going to accept the officer's visual estimation, because I think that's where he was strong enough, strongest in his testimony. And his visual estimation . . . was that he believed [Mr. Jenney] was traveling at 70 miles an hour." This Court has held that a conviction may be based solely on an "officer's testimony that he observed [a] defendant traveling in excess of the posted speed limit." *State v. Wilson*, 9th Dist. No. 95CA006285, 1996 WL 668993 at *1 (Nov. 20, 1996) (citing *City of Cincinnati v. Dowling*, 36 Ohio App. 3d 198, 200 (1987); *Village of Kirtland Hills v. Logan*, 21 Ohio App. 3d 67, 69 (1984)). While Mr. Jenney has asked this Court to reconsider its conclusion that a visual estimate by a law enforcement officer is sufficient to support a speeding conviction, this Court declines his invitation. Mr. Jenney's second assignment of error is overruled.

MANIFEST WEIGHT

{¶10} Mr. Jenney's third assignment of error is that his conviction is against the manifest weight of

the evidence. When a defendant argues that his conviction is against the manifest weight of the evidence, this Court "must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Otten*, 33 Ohio App. 3d 339, 340 (1986).

{¶11} Mr. Jenney has argued that Officer Santimarino's testimony was not credible because he gave inconsistent answers about how fast the radar device said he was traveling. Officer Santimarino initially testified that the device clocked him traveling "at 73 mile[s] per hour." He later said that the radar device clocked him traveling "at a speed of 82 mile[s] per hour." Shortly thereafter, he said that the device "displayed a speed of . . . 83 [miles per hour]." When the prosecutor asked Officer Santimarino whether Mr. Jenney's speed was 82 or 83 miles per hour, the officer asserted that he had made a mistake and that it was 82 miles per hour. He then indicated that it was what was "written down on the citation." On the citation, Officer Santimarino had written 79 miles per hour.

{¶12} On cross-examination, Officer Santimarino repeated that the radar device had clocked Mr. Jenney traveling at 82 miles per hour. He said that he wrote 79 miles per hour on the traffic citation as a courtesy to Mr. Jenney so that Mr. Jenney could avoid a mandatory court appearance.

He said that, on the ticket, he had made a small note indicating "the actual speed that [Mr. Jenney] was traveling." When he read his note, he said that Mr. Jenney's speed had been 83 miles per hour.

{¶13} Mr. Jenney has also argued that Officer Santimarino was inconsistent about the number of times he had visually estimated the speed of vehicles during his training. The prosecutor asked Officer Santimarino: "And so when you were in this training, how many times did you practice making a visual estimation of a vehicle?" Officer Santimarino answered: "Probably hundreds of times in the training." After Mr. Jenney noted that Officer Santimarino's answer seemed high, the court asked him: "When you were being trained on the visual estimation technique . . . how many visual estimations did you do before you were adjudged to be certified?" Officer Santamarino replied: "Probably five to ten."

{¶14} Mr. Jenney has further argued that no weight should be given to Officer Santimarino's visual estimate because of how much different it was from what the radar device calculated. Mr. Jenney has noted that Officer Santimarino's estimate was more than 10 miles per hour different than what the radar device indicated. He, therefore, has argued that, even if Officer Santimarino was trained in visually estimating speeds, he miscalculated on this occasion.

{¶15} While Officer Santimarino was inconsistent about how fast the radar device said Mr. Jenney was traveling, the municipal court relied on

the officer's visual estimate of Mr. Jenney's speed, which it found credible. In addition, Officer Santimarino's answers about the number of times he visually estimated the speed of vehicles are reconcilable. His first answer referred to the number of estimates he made during the course of his training. His second answer referred to the number of estimates he had to make during his certification test. It is logical that Officer Santimarino would practice visually estimating the speed of vehicles many times to ensure that he got the ones during his certification test correct. Furthermore, although Officer Santimarino's visual estimate was different than what the radar device calculated, Mr. Jenney has established that it is unknown whether Officer Santimarino was properly certified to operate the device. Mr. Jenney cannot reasonably argue that the device's reading is not reliable enough to support his conviction because the City failed to lay a proper foundation for its admission but is reliable enough to impeach the officer's ability to do a visual estimation.

{¶16} The municipal court did not lose its way and create a manifest miscarriage of justice by accepting Officer Santimarino's testimony that Mr. Jenney was traveling faster than the posted speed limit. Mr. Jenney's third assignment of error is overruled.

CONCLUSION

{¶17} The municipal court properly allowed the City to amend the traffic citation. Mr. Jenney's conviction is supported by sufficient evidence and is

not against the manifest weight of the evidence. The judgment of the Barberton Municipal Court is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Barberton Municipal Court, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, P. J.
CONCURS

WHITMORE, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶18} I concur in judgment only. Although the majority determines Mr. Jenney forfeited any challenge to the reliability of the Python radar device utilized by Officer Santimarino, I note my continued disagreement with the need for trial and appellate courts to address the reliability of every different speed monitoring device utilized by law enforcement, as I believe the science underlying such devices has reached the point of general reliability within the scientific community. See *State v. Freitag*, 9th Dist. No. 07CA0082, 2008-Ohio-6573, ¶2128 (Whitmore, J., dissenting). See, also, *Cleveland v. Tisdale*, 8th Dist. No. 89877, 2008-Ohio2807, at ¶18. Given the state of science underpinning radar technology, I consider the perpetuation of the requirement as "ha[ving] returned us to a pre-*Ferell* state of '[wasting] the time of experts *** and [increasing] the expenses of litigation *** by compelling such [experts] to appear in court after court telling the same truths over and over[.]'" *Freitag* at ¶25, quoting *East Cleveland v. Ferell* (1958), 168 Ohio St. 298, 302.

{¶19} And while I agree that the trial court should focus on the calibration and operational status of the particular device being used and the qualifications of the person using it, I disagree with the majority's contention that evidence such as a certificate of training is required to validate an officer's testimony that he or she has been properly trained in the use of the device. At the hearing, Officer Santimarino testified that he has worked in

traffic enforcement since 1995. He testified that he was trained at the police academy to operate and calibrate Doppler radar devices and that he received certification of that training. He further stated that, at the beginning of his shift that day, he activated the machine's internal calibration test which indicated the machine was working properly. Additionally, he testified at length as to the external calibration testing he performed utilizing tuning forks, which also indicated that machine was operating properly and accurately calibrated. Officer Santimarino confirmed on cross examination that he received training on the Python unit specifically when his police department began using it, but didn't recall the exact year of that training.

{¶20} I consider Officer Santimarino's testimony as providing the court with sufficient evidence that he was qualified to operate the radar device in question. See *Brunswick v. Dove*, 9th Dist. No. 02CA0059-M, 2003-Ohio-2424, ¶6-7 (affirming a radar-based speeding conviction based on evidence in the record – the officer's own testimony – "reveal[ing] that [the officer] received training in the calibration and operation of the radar unit"). See, also, *State v. Bayus*, 11th Dist. No. 2005-G-2634, 2006-Ohio-684, at ¶19 (concluding that an "officer's testimony with respect to his or her qualifications and experience, is sufficient to establish that he or she is qualified to use the radar device"). To require the prosecution to introduce a certificate of training in every trial that occurs as the result of a speeding citation would impose too onerous a burden upon the prosecution and is unnecessary when a proper and thorough

examination of the officer could otherwise demonstrate the officer was qualified to operate the radar device. Moreover, we do not require similar certification of training for officers who conduct field sobriety testing in convictions for driving under the influence offenses, which arguably requires more independent skill and training than does operating a speed monitoring device. See *State v. Overholt* (April 12, 2000), 9th Dist. No. 2980-M, at *5-6 (affirming a conviction for driving under the influence based solely on the officer's testimony that he was properly trained and qualified to conduct field sobriety testing).

{¶21} While I agree that Mr. Jenney's speeding conviction was not based upon insufficient evidence or against the manifest weight of the evidence and should be affirmed, I disagree with the majority's conclusion that the trial court should not have permitted Officer Santimarino to testify as to the speed he recorded using the Python radar device. Accordingly, I concur in judgment only.

APPEARANCES:

JOHN M. KIM, attorney at law, for appellant.
MICHELLE BANBURY, assistant prosecutor, for appellee.